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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability  
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;  
MARK ZUCKERBERG, an individual;  
CHRISTOPHER COX, an individual;  
JAVIER OLIVAN, an individual;  
SAMUEL LESSIN, an individual;  
MICHAEL VERNAL, an individual;  
ILYA SUKHAR, an individual; and  
DOES 1-50, inclusive,

Defendants.

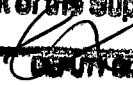
Case No. CIV 533328

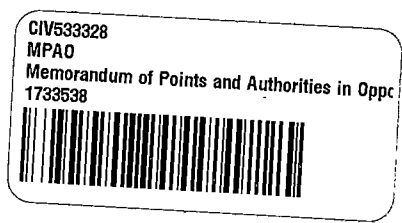
Assigned for all purposes to Hon. V. Raymond  
Swope, Dept. 23

**DEFENDANT FACEBOOK INC.'S  
OPPOSITION TO BIRNBAUM & GODKIN,  
LLP AND GROSS & KLEIN LLP'S EX  
PARTE APPLICATION FOR AN ORDER  
STAYING ALL DISCOVERY PROCEEDINGS**

Date:  
Time:  
Dept: 23 (Complex Civil Litigation)  
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015  
TRIAL DATE: April 25, 2019

**FILED**  
**SAN MATEO COUNTY**  
MAR 28 2019  
Clerk of the Superior Court  
By  **DEPUTY CLERK**



1   **I.     INTRODUCTION**

2           The Court should deny Six4Three’s lawyers’ *Ex Parte* Application to Stay Discovery  
3 (“Application”) for three reasons.

4           First, Six4Three’s counsel have no basis—no new facts or new law—to challenge the Court’s  
5 ruling that discovery is necessary and appropriate to get to the bottom of the *ongoing* leaks of the  
6 confidential information Facebook produced to Six4Three in this case.

7           Second, Six4Three’s counsel have made no argument that exigent circumstances require a stay  
8 before anyone even files a writ. That is because *no one has filed a writ yet*. They are asking this Court  
9 for a stay based on a representation that they will file a writ at some unspecified future date.

10          Third, weighing the interests, discovery should proceed while Six4Three or its counsel decide  
11 whether to seek a writ, at which point they can ask the Court of Appeal for a stay if they believe one is  
12 justified. Whereas Six4Three has identified nothing new since it last argued against discovery, delays in  
13 discovery threaten serious prejudice to Facebook because its confidential and highly confidential  
14 information continues to leak to the international media. Adding insult to injury, and further  
15 disrespecting this Court’s orders, including the Protective Order, Six4Three continues in its efforts to  
16 draw public attention to the documents it leaked—posting commentary and links to them online. Given  
17 the ongoing nature of Six4Three’s violations, a stay is not only unwarranted, it would cause Facebook  
18 irreparable harm as its confidential information continues to find its way into the public domain.

19          Moreover, even if Six4Three’s lawyers were correct that the Court should stay certain aspects of  
20 its March 15 Order in light of Six4Three’s lawyers’ concerns (it should not), their request that the Court  
21 shelve the entire order is a gross overreach. For example, discovery into Mr. Kramer and Mr.  
22 Scaramellino’s third-party communications may and should go forward. So should discovery into the  
23 activities of Six4Three’s supposed “experts” including Mr. Dehayé, who still refuses to confirm that he  
24 did not disclose confidential or highly confidential Facebook information to third parties including the  
25 press.

26   **II.    LEGAL ARGUMENT**

27       **A.     Birnbaum & Godkin and Gross & Klein’s *Ex Parte* Application Contains No New**  
28

1                   **Facts or Law.**

2           At least eight times across eight pages, Six4Three’s lawyers repeat the mantra that they are barred  
3 from advising or representing Six4Three. The Court has heard this argument before: Six4Three’s  
4 lawyers have invoked this refrain in virtually every filing since December 2018. But then, as now,  
5 Six4Three’s lawyers’ briefing lacks *any* authority for the proposition that a lawyer may unilaterally claim  
6 conflict and cease representing her client. *See generally* Appl. at 6 (citing only Rule 1.16 of the Rules of  
7 Professional Conduct). Facebook’s various submissions on this point—including its Opposition to the  
8 lawyers’ withdrawal motion, *see* Def.’s Opp’n to Birnbaum & Godkin and Gross & Klein’s Mots. to Be  
9 Relieved as Counsel at 9-11 (Jan. 17, 2019), its February *Ex Parte* Application for an Order Enforcing  
10 the Protective Order, *see* Def.’s *Ex Parte* Appl. for an Order Enforcing the Stip. Protective Order at 13-  
11 14 (Feb. 25, 2019), and its oral argument regarding the withdrawal motions, *see* Hr’g Tr. at 35-36 (Mar.  
12 13, 2019)—make clear that the Court, not Six4Three’s lawyers, determines when Six4Three’s lawyers  
13 may stop representing their clients. The lawyers’ *ipse dixit* wasn’t enough to halt the case then, and it’s  
14 not enough to halt the case now.

15           On the merits, Six4Three’s lawyers give no reason why they can’t represent their client in  
16 connection with the discovery ordered by this Court. For example, the lawyers fail entirely to explain  
17 how Facebook’s “accusations” and “discovery requests” create an un-waivable conflict between  
18 themselves and Six4Three. Appl. at 6-7. They simply allege that a conflict exists, without explaining  
19 what the conflict is or why it’s unwaivable. *Id.* At most, they say that counsel “cannot represent  
20 SIX4THREE while also being a third party witness.” *Id.* at 7. But this argument rings hollow, given that  
21 Six4Three had no issue hiring Mr. Scaramellino—Six4Three’s sole investor and a key third party  
22 witness—to work as a member of its legal team. That arrangement lasted several years and saw Mr.  
23 Scaramellino sit for a deposition as a fact witness despite his position on the legal team.

24           **B.     Birnbaum & Godkin and Gross & Klein’s *Ex Parte* Application Hinges on A Writ**  
25           **That They Have Not Filed Yet.**

26           Six4Three’s lawyers want a stay on the basis of a writ that they “intend[] to file . . . challenging  
27 the March 15, 2019 Court Order reopening discovery[.]” Appl. at 3:16-17. But the lawyers do not say  
28 *when* they intend to file. Until they do, any stay by this Court would be premised on a hypothetical event

1 occurring *some time* in the future. The Court should not issue stays of carefully thought-out and  
2 reasoned orders based on counsel's hypotheticals. Indeed, it is far from clear that Birnbaum & Godkin  
3 and Gross & Klein *will* seek writ relief quickly. Six4Three's lawyers could have requested a stay orally,  
4 in open court, on March 15. But they did not. Similarly, almost two weeks have passed since the  
5 Court's discovery order issued. If this situation truly presented exigent circumstances, one would have  
6 expected Six4Three's lawyers to have filed a writ by now. For this reason alone, the Application should  
7 be denied.

8 Nor is relief from this Court necessary to accomplish Birnbaum & Godkin and Gross & Klein's  
9 objectives. The California Rules of Court are clear that Six4Three's lawyers may ask the Court of  
10 Appeal for a temporary stay with their writ petition. *See* Cal. R. Ct., rule 8.486(a)(7) (describing  
11 procedural requirements where petition requests a temporary stay). If and when Six4Three's lawyers file  
12 their writ, they can make their stay request at that time.

13 **C. A Stay Will Irreparably Prejudice Facebook.**

14 Six4Three's lawyers' Application asks for a stay until "such time as all parties are represented by  
15 independent counsel." Appl. at 3:14-15. But that day may never come. Six4Three's lawyers told  
16 Six4Three to find new lawyers in *November 2018*. *See* Hr'g Tr. at 19:16-21 (Nov. 30, 2018). Four  
17 months have passed since then, and Six4Three seems no closer to retaining counsel to replace Birnbaum  
18 & Godkin and Gross & Klein. Indeed, as recently as January 24, 2019, Mr. Kramer swore that he had  
19 unsuccessfully pitched seven law firms on Six4Three's case. *See* Kramer Decl. re Pl.'s Conditional  
20 Acceptance of Mot. to be Relieved as Counsel ¶¶ 6-13 (Jan. 24, 2019). But that declaration only  
21 highlighted that Six4Three's attempts to secure counsel have been futile at best, and insincere at worst.  
22 *See generally* Def.'s Supp. Opp. to Decl. of Theodore Kramer (Feb. 1, 2019). Either way, make no  
23 mistake: waiting for Six4Three to hire independent counsel means freezing this case indefinitely.

24 In the meantime, the prejudice to Facebook and the Court would continue. Facebook would have  
25 no assurance that its confidential and highly confidential information won't appear in newspapers and on  
26 file-sharing sites. *See, e.g.,* Def.'s *Ex Parte* Appl. for an Order Enforcing the Stip. Protective Order at 8-  
27 9 (Feb. 25, 2019) (describing continuing leaks of Facebook confidential and highly confidential  
28 information via *The Guardian* and public Github share). Facebook would be unable to question

1 Six4Three and its legal team regarding disclosures made to Six4Three’s purported “experts” and the role  
2 those experts played in furthering Six4Three’s stated objective of making Facebook’s confidential  
3 documents public. *See generally id.* at 6. And the Court would lack answers to questions that the Court  
4 has been asking since November 2018. *See re* Def.’s Mot. to Open Disc. & to Compel at 9 (Mar. 15,  
5 2019) (“Mr. Godkin: . . . [T]he documents would have been placed on Six4Three’s Dropbox system.  
6 The Court: How? Mr. Godkin: I don’t know.”). As the Court has acknowledged, litigants in San Mateo  
7 must have confidence that protective orders mean what they say. That confidence will be shaken until  
8 the Court and Facebook investigate and resolve Six4Three’s misconduct.

9       Indeed, Six4Three’s recent conduct confirms that Facebook would only continue to suffer  
10 prejudice during any stay. Beginning in late February, Six4Three began posting online about this case  
11 and Facebook, apparently in an effort to bring more media and public attention to the documents it  
12 leaked and its campaign against Facebook. *See generally* Decl. of Zachary G. F. Abrahamson submitted  
13 herewith (“Abrahamson Decl.”) Ex. 1, <https://medium.com/@six4three>. For example, just one week ago  
14 (on March 20), Six4Three posted a 6,800-word missive in which it described and summarized Facebook  
15 confidential documents that Six4Three leaked to the DCMS Committee, and even provided links to those  
16 documents. *See generally* Abrahamson Decl. Ex. 2, [https://medium.com/@six4three/u-s-vs-facebook-a-](https://medium.com/@six4three/u-s-vs-facebook-a-playbook-for-the-sec-doj-and-edny-408e05783f59)  
17 [playbook-for-the-sec-doj-and-edny-408e05783f59](https://medium.com/@six4three/u-s-vs-facebook-a-playbook-for-the-sec-doj-and-edny-408e05783f59); *see id.* (referencing “emails like this one” and linking  
18 to leaked copy of Exhibit 44 to the Godkin Anti-SLAPP Opp’n Declaration (May 17, 2018)). This is yet  
19 another violation of the protective order, which prohibits recipients of confidential or highly confidential  
20 information from discussing such information with anyone not entitled to receive such information  
21 (particularly where the information has been made public in violation of the protective order), and also  
22 prohibits the use of confidential or highly confidential information for any purpose other than this case.  
23 (Stip. Protective Order ¶¶ 3, 6 (Oct. 25, 2016)). Moreover, Six4Three’s Medium post misrepresents the  
24 Court’s order finding that Six4Three and its legal team coordinated to plan a crime or a fraud. *See*  
25 Abrahamson Decl. 2 (“[T]he Court’s ruling actually has no evidentiary support to conclude that  
26  
27  
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1 Six4Three and its attorneys have engaged in a criminal conspiracy.”).<sup>1</sup> If members of the legal team—  
2 past or present—are involved in Six4Three’s online posts, these posts not only take advantage of the leak  
3 of information in violation of the Protective Order but also run afoul of the Court’s admonition regarding  
4 the Rules of Professional Conduct. *See* Order re Def.’s Mot. to Open Disc. & to Compel at 7 (Mar. 15,  
5 2019) (citing Cal. Rules of Prof’l Conduct, rule 3.6(b)(1)-(5)). A stay would tie Facebook and the  
6 Court’s hands while Six4Three and its legal team continue to violate the Court’s orders.

7 **D. In the Alternative, the Court’s Order Should Be Stayed as to Birnbaum & Godkin**  
8 **and Gross & Klein Alone—Not as to Unprivileged Communications Involving**  
9 **Six4Three, Mr. Kramer, Mr. Scaramellino or Purported “Experts”.**

10 The Application purports to seek a stay of “all other discovery directed at COUNSEL *and*  
11 *Six4Three*.” *Ex Parte* Appl. at 2:5-8; *see also id.* at 3:25-26 (arguing that stay is necessary to prevent  
12 “permanent harm . . . to *SIX4THREE*”) (emphasis added). But Six4Three’s lawyers’ lawyers—that is,  
13 Murphy Pearson and Wilson Elser—can’t seek such relief on Six4Three’s behalf because *Murphy*  
14 *Pearson and Wilson Elser don’t represent Six4Three*. Twice, the Court has admonished Six4Three’s  
15 lawyers’ lawyers on this point. *See* Abrahamson Decl. Ex. 3, Court email to Lerner and others (Mar. 14,  
16 2019) & Ex. 4, Court email to Sullivan and others (Mar. 22, 2019). If Murphy Pearson and Wilson Elser  
17 want to advocate for relief on Six4Three’s behalf, they should file a notice of appearance for Six4Three.  
18 Until then, they may represent only the interests of Birnbaum & Godkin and Gross & Klein.

19 This isn’t a mere formality: Six4Three’s lawyers repeatedly have sought withdrawal on the basis  
20 of a “complete breakdown in the attorney client relationship” between Six4Three and the lawyers. *See*  
21 *Mem. P & A Supp. Birnbaum & Godkin’s Mot. to Be Relieved as Counsel*, at 3 (Jan. 8, 2019). As far as  
22 Facebook and the Court know, that “complete breakdown” hasn’t been resolved. So there’s no way for  
23 Murphy Pearson and Wilson Elser to file pleadings on Six4Three’s behalf. Nor should the firms be  
24 permitted to make statements on behalf of Six4Three. *See, e.g.,* Appl. at 5:22-23 (“Given the conflict,  
25 *SIX4THREE* cannot comply with such requests with the advice of present counsel.”).

26 \_\_\_\_\_  
27 <sup>1</sup> Six4Three also continues to fabricate unspecified “retaliatory efforts” by Facebook’s lawyers, which  
28 Six4Three says “should also be looked at closely by government regulators.” Abrahamson Decl. Ex. 2.  
Facebook’s only efforts here are to ask this Court to help get to the bottom of who has Facebook’s  
confidential and highly confidential information, and to uncover and remedy the full scope of misconduct  
by Six4Three and its legal team.

1 Finally, even if Birnbaum & Godkin and Gross & Klein's concerns about privilege had merit, the  
2 Court's order opening discovery unquestionably encompasses materials as to which no party can possibly  
3 claim privilege. As one example, discovery can and must proceed as to communications between Mr.  
4 Kramer or Mr. Scaramellino, on the one hand, and third parties, on the other. As the Court recognized  
5 when it ordered similar productions from Six4Three's lawyers in December, no possible privilege claim  
6 can lie as to such documents. An e-mail between Mr. Kramer, for example, and a media organization is  
7 neither work product nor an attorney-client communication. Likewise, discovery into the actions of  
8 Six4Three's purported experts—including Mr. Dehayé—should proceed. Although Mr. Dehayé  
9 expressly agreed to be subject to this Court's jurisdiction when he signed on to receive Facebook's  
10 confidential information under the Stipulated Protective Order as an "expert" for Six4Three, he has now  
11 refused to comply with multiple orders (and numerous requests from Facebook) to provide the basic  
12 information regarding his compliance or non-compliance with that protective order. As the Court's  
13 March 21, 2019 email denying Facebook's request to file an *ex parte* application contemplated,  
14 Facebook intends to seek discovery into Mr. Dehayé's communications and actions with respect to  
15 Facebook's confidential information that was disclosed to him by the legal team seeking to set him up as  
16 an anonymous source for the media. Accordingly, regardless of the Court's decision on staying  
17 enforcement of its crime-fraud ruling, certain discovery may—indeed, in light of the prejudice that  
18 Facebook will suffer, *must*—proceed.

19 **III. CONCLUSION**

20 Six4Three's lawyers' Application should be denied. In the alternative, the Court should stay only  
21 discovery from Mr. Godkin and Mr. Gross, and production of documents as to which Six4Three asserts  
22 attorney-client privilege.

24 Dated: March 27, 2019

DURIE TANGRI LLP

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**PROOF OF SERVICE**

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On March 27, 2019, I served the following documents in the manner described below:

**DEFENDANT FACEBOOK INC.'S OPPOSITION TO BIRNBAUM & GODKIN, LLP  
AND GROSS & KLEIN LLP'S EX PARTE APPLICATION FOR AN ORDER  
STAYING ALL DISCOVERY PROCEEDINGS**

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from zabrahamson@durietangri.com to the email addresses set forth below.

On the following part(ies) in this action:

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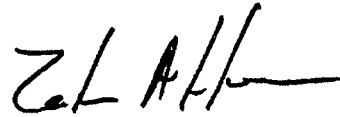
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*Attorney for Birnbaum & Godkin, LLP*

I declare under penalty of perjury under the laws of the United States of America that the

1 foregoing is true and correct. Executed on March 27, 2019, at San Francisco, California.  
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